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Federal Communications Commission
Washington, D.C. 20554FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of the Commission's Rules to Ensure)
Compatibility with Enhanced 911 Emergency)
Calling Systems)

CC Docket No. 94-102

To: The Commission

**DOBSON CELLULAR SYSTEMS, INC. AND AMERICAN CELLULAR
CORPORATION JOINT PETITION FOR RECONSIDERATION**

Pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, Dobson Cellular Systems, Inc. ("Dobson") and American Cellular Corporation ("ACC") (collectively "Dobson")¹ hereby jointly petition the Commission to reconsider a portion of its *Order* in the above-captioned proceeding.²

Dobson continues to place a high priority on coordinating efforts with the public safety community and its vendors to meet the new interim deployment deadlines for the delivery of network-based Phase II solutions set forth in the *Order*.³ Dobson generally commends the Commission's decision to extend the deployment deadlines to acknowledge the difficult situation

¹ As previously reported in this proceeding, in 2000, the parent of Dobson Cellular Systems, Inc., Dobson Communications Corporation and AT&T Wireless, in a joint venture, acquired American Cellular Corporation. ACC is currently controlled by the joint venture, and Dobson Cellular Systems, Inc. manages the licenses held by ACC and its various subsidiaries. This petition for reconsideration is filed on behalf of Dobson, ACC, and that of their various Commission-licensed subsidiaries and affiliates.

² See *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order To Stay*, CC Docket No. 94-102, FCC 02-210 (rel. July 26, 2002) ("*Order*").

³ *Id.* ¶ 26.

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facing mid-sized wireless carriers. Nonetheless, Dobson is compelled to file the instant petition to seek reconsideration of one specific provision of the *Order* also raised by certain nationwide carriers.⁴ Specifically, Dobson seeks reconsideration of the Commission's apparent adoption of a "strict liability" determination in paragraphs 36 and 37 of the *Order* that specifies that non-nationwide carriers, such as Dobson and ACC, will be deemed noncompliant for failure to meet the new interim performance benchmarks without regard to a vendor, manufacturer, or other entity's inability to supply compliant products.⁵

I. THE COMMISSION MUST PROVIDE NON-NATIONWIDE CARRIERS A MEANINGFUL OPPORTUNITY TO CHALLENGE A FINDING OF NONCOMPLIANCE.

A. The Commission's Stated Enforcement Policy Imposes a "Strict Liability" Standard on Non-Nationwide Carriers for Failure to Comply with Conditions in the *Order*.

The record in this proceeding demonstrates that wireless carriers have only a limited impact on the vendors' ability to provide Phase II-compliant equipment, and on the timely provision of services and facilities by other responsible parties. It is for this very reason that wireless carriers of all sizes have been forced to seek relief from the Commission's Phase II rules. Small and mid-sized carriers in particular lack the market power to affect manufacturers' and vendors' commitments to deliver compliant equipment and software. In fact, in articulating the basis for staying the original Phase II deployment benchmarks in the *Order*, the Commission

⁴ See *Verizon Wireless Petition for Reconsideration*, CC Docket 94-102 (filed Nov. 13, 2001); *Cingular Wireless LLC Petition for Reconsideration*, CC Docket 94-102 (filed Nov. 13, 2001); *Joint Petition for Clarification and Partial Reconsideration of Nextel Communications, Inc and Nextel Partners, Inc.*, CC Docket 94-102 (filed Nov. 13, 2001).

⁵ Order ¶¶ 36-37

recognizes the smaller carriers' limited ability to control their respective vendors' deployment priorities:

Based on th[e] record [in this proceeding], we conclude that handset vendors and network-based location technology vendors give priority to the larger, nationwide carriers. Nationwide carriers' deployment schedules have created downstream delays for Tier II and Tier III carriers.⁶

Despite small and mid-sized carriers' best efforts, guaranteeing vendors' availability schedules remains beyond carriers' control.

Nevertheless, the Commission appears to have imposed a "strict liability" upon non-nationwide carriers.⁷ The Commission recognizes in the *Order* that future extensions or waivers may be warranted – a determination consistent with settled law.⁸ The Commission states, however, that non-nationwide carriers "will be deemed noncompliant" if they do not have compliant Phase II service available in accordance with the *Order*:

⁶ *Order* ¶ 11.

⁷ The Commission imposed a similar strict liability standard on a number of nationwide carriers as well. See, e.g., *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Verizon Wireless*, CC Docket No. 94-102, FCC 01-299, ¶ 35 (2001) ("*Verizon Order*"); *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless LLC*, CC Docket No. 94-102, FCC 01-296, ¶ 27 (2001).

⁸ See *Order* ¶ 36; *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fourth Memorandum Opinion and Order* 15 F.C.C.R. 17442, ¶¶ 39, 45 (2000) ("*Fourth MO&O*") (citing 47 C.F.R. § 1.3, *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). The Commission has applied this standard to requests for further waiver of deadlines established in prior orders granting waiver of the deadline. See *Coon Valley Telephone Company*, 13 F.C.C.R. 17490, ¶ 6 (1998); *Radcliffe Telephone Company, Inc.*, 13 F.C.C.R. 16835 (1998); *Pierce Telephone Company, Inc.*, 13 F.C.C.R. 7241 (1998); see also *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997) (noting "Commission's rules allow it 'at any time' to waive requirements for good cause"). If the phrase "revocation of the relief" in the *Order* means that enforcement penalties may be imposed retroactively then Dobson and ACC would challenge the Commission's authority to impose such a penalty.

If any carrier does not have compliant Phase II service available on the dates set forth herein, *it will be deemed noncompliant* and referred to the Commission's Enforcement Bureau for possible action. *At that time, an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.* However, a carrier's "concrete and timely" actions taken with a vendor, manufacturer, or other entity may be considered as possible *mitigation factors* in such an enforcement context.⁹

This statement appears to establish a *per se* finding of liability by the Enforcement Bureau, particularly given that something so significant as unavailability of compliant equipment will only be considered a possible *mitigation* factor rather than excuse noncompliance.¹⁰ Such a determination clearly contravenes the Commission's authority under the Communications Act, its own rules and judicial precedent, and should be reversed on reconsideration.

B. The Communications Act Requires the Commission to Afford Carriers the Opportunity to Rebut a Finding of Noncompliance.

Carriers are entitled to a real opportunity to counter a Commission determination of noncompliance or, at a minimum, to demonstrate why excusal is warranted.¹¹ Notwithstanding that it would be inconsistent with due process and Section 503 of the Act, the Commission appears to have improperly eliminated that opportunity here. In particular, Section 503(b)(4) of the Act requires, in relevant part: "[N]o forfeiture penalty shall be imposed under this subsection against any person unless and until . . . the Commission issues a notice of *apparent* liability, in writing, with respect to such person; [and] *such person is granted an opportunity to show . . .*

⁹ Order ¶ 37 (emphasis added).

¹⁰ A finding of noncompliance even in the absence of a forfeiture, may have substantive implications for cellular and PCS licensees like Dobson. See 47 C.F.R. §§ 22.940(a), 24.16(b) ("substantial compliance" a prerequisite for obtaining renewal expectancy).

¹¹ See *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) ("Notice and a meaningful opportunity to challenge the agency's decision are the essential elements of due process.").

why no such forfeiture penalty should be imposed.”¹² Indeed, this provision of the Act gives a carrier the opportunity to show why it is not liable in the first instance – thus “apparent liability.”¹³

In light of the Commission’s determination that the unavailability of compliant products or necessary services from vendors or other carriers will only mitigate a penalty, not excuse noncompliance – thus eliminating “impossibility” as a basis for noncompliance – a finding of noncompliance appears incontrovertible, regardless of Dobson’s good faith efforts.¹⁴ This is particularly improper where compliance is wholly dependent on the acts or omissions of unaffiliated third parties and, as here even good faith efforts cannot ensure compliance.¹⁵ The

¹² 47 U.S.C. § 503(b)(4) (emphasis added). The Commission’s rules implementing Section 503 reflect these requirements. See 47 C.F.R. § 1.80(f)(3).

¹³ “[I]t should be stressed that a notice of apparent liability is not a finding of liability. The purpose of the notice of apparent liability is to inform the licensee of the apparent violations and to grant him an opportunity to show why he should not be held liable. No liability can attach unless and until the licensee is given the notice and opportunity to respond. The legislative history of sections 503 and 504 of the Communications Act reveals that the present statutory scheme was the direct outgrowth of Congress’ concern that licensees might be found liable without being accorded ‘due process.’” *Liability of Altavista Broadcasting Corp.*, 2 FCC 2d 445, ¶ 7 (1966) (citing S. Rep. 1857, 86th Congress, 2d session, at 8-10). This is consistent with Commission practice as well. See, e.g., *Notice of Apparent Liability for Forfeiture of Western PCS BTA 1 Corp.*, 14 F.C.C.R. 21571, ¶ 1 (1999); *Mercury PCS II, LLC*, 13 F.C.C.R. 23755 (1998); *Waterman Bdcasting Corp.*, 11 F.C.C.R. 14547 (1996), rescinded by letter dated Apr. 15, 1997 (not possible to determine whether violation had occurred, as explained in *NPR Phoenix*, 13 F.C.C.R. 14070, ¶ 5 (1998)).

¹⁴ See *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991); *Hughey v. JMS Development Corp.*, F.3d 1523, 1530 (11th Cir. 1996), quoting Black’s Law Dictionary 912 (6th ed. 1990) (“*Lex con cogit ad impossibilia*: The law does not compel the doing of impossibilities”); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1294 (9th Cir. 1977) citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

¹⁵ See *Midwest Radio-Television, Inc.*, 45 F.C.C. 1137, 1141 (1964); H.R. Rep. No. 97-765, at 50-51 (1982) (explaining Congress’ intent to incorporate *Midwest Radio-Television* standard into “willful” definition for Sections 312 and 503 of Act).

Commission must reconsider this aspect of the *Order* to ensure that enforcement of the E-911 rules is consistent with the agency's statutory mandate.

C. Administrative Law Principles Mandate that the Commission Provide Carriers an Avenue for Recourse

The Commission may adopt rules and deadlines on the basis of its predictive judgment, provided that the Commission also provides meaningful "safety valve" procedures. In this regard, although the Commission appropriately found in the *Fourth MO&O* that third-party vendors' inability to timely provide compliant products is a basis for rule waiver, it erroneously cites that decision as the basis for its enforcement approach here.¹⁶ Indeed, the Commission has traditionally waived or modified its rules where compliance is dependent on the availability of equipment from vendors.¹⁷ In this very proceeding the Commission recently granted a series of

¹⁶ See *Order* ¶ 37 (citing *Fourth MO&O*, 15 F.C.C.R. at 17458).

¹⁷ See, e.g., *Telephone Number Portability, Petitions for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase II*, 13 F.C.C.R. 9564, 9568 ¶ 18, 9570 ¶ 25 (1998) (inability of LNP database provider to provide stable platform for wireline LNP "warrants a deviation from the general rule"); *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, WT Docket No. 01-184, CC Docket No. 95-116, Memorandum Opinion and Order, FCC 02-215 ¶ 24-25 (rel. July 26, 2002) (granting partial forbearance and extending LNP deadline due to carriers' submission of evidence demonstrating that implementation of the network architecture necessary for pooling is particularly complex for wireless carriers and "... to guard against any potential network disruptions."); *Roosevelt County Rural Telephone Cooperative, Inc.*, 13 F.C.C.R. 22, ¶¶ 29-36 (1997); *Cuba City Telephone Exchange Company et al.*, 12 F.C.C.R. 21794, ¶¶ 16-25 (1997); *C, C & S Telco, Inc. et al.*, 6 F.C.C.R. 349, ¶¶ 6, 12 (1991); *Policies and Rules Concerning Operator Service Providers*, 5 F.C.C.R. 4630, ¶ 22 (1990); *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 - Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 F.C.C.R. 1981, ¶¶ 76-77 (1994) (adjusting compliance deadlines for certain cable box devices based on unavailability of products from manufacturers); *Garmin International Inc.*, Order, DA 02-2033, ¶ 5 (WTB rel. Aug. 21, 2002) (extending period covered by waiver in response to second request due in part to the complex and time-consuming steps a manufacturer faces in developing Family Radio Service transceivers capable of transmitting GPS location information); *EarthWatch Inc.*, 15 F.C.C.R. 18725, ¶¶ 6-8 (Int'l Bur. 2000) (granting

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waivers to carriers extending the deadline by which carriers' digital networks must be TTY-compatible because "[the carriers'] requests for limited waivers based on vendor delays are well-supported by the evidence[,] and "requiring compliance with the [initial deadline] would be unduly burdensome and in many instances not feasible, *despite the best efforts of the carriers.*"¹⁸ Moreover, in the *TTY Waiver Order*, the Commission recognized that technological problems may appear "late in the implementation process[,] and "only reveal[] themselves in the late stages of testing and implementation."¹⁹ Nevertheless, under the terms of the *Order*, a finding of noncompliance will be handed down if a carrier is unable to make compliant Phase II services available at the benchmarks established in the *Order* regardless of late developing vendor-related problems that may arise and a carrier's best efforts.

Finally, the FCC's approach is contrary to fundamental tenets of administrative law. An agency must have a record basis for requirements based on predictive judgments.²⁰ When predictions do not "pan out," the agency must revisit the underlying requirements.²¹ "The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments

third extension of construction deadline due to unforeseen technical problem with component of satellite).

¹⁸ *Revision of the Commission's Rules To Ensure Compatibility with the Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Order*, DA 02-1540, ¶¶ 17-18 (rel. June 28, 2002) ("*TTY Waiver Order*") (emphasis added).

¹⁹ *Id.* at ¶ 20.

²⁰ See *AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984)); *ASG Industries Inc. v. CPSC*, 593 F.2d 1323, 1335 (D.C. Cir. 1979); *National Ass'n of Indep. Television Producers and Distributors v. FCC*, 502 F.2d 249, 254 (2d Cir. 1974) (APA "does not authorize the use of an effective date that is arbitrary or unreasonable").

²¹ See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) ("should the Commission's predictions about the effectiveness of international coordination prove erroneous, the Commission will need to reconsider its allocation in accordance with its continuing obligation to practice reasoned decisionmaking").

in light of actual experience” and a “duty to finetune its regulatory approach as more information becomes available”²² Where the Commission’s informed predictions do not emerge as expected, waiver procedures are essential to ensure the legitimacy of the rules at issue.²³

E-911 Phase II deadlines throughout this proceeding have been largely premised on vendors’ predictions of the commercial availability of Phase II solutions.²⁴ The Commission found in September 2000 that waivers “should not generally be warranted” because “ALI technologies are already, or will soon be, available that provide a reasonable prospect for carriers to comply with the E911 Phase II requirements.”²⁵ In the *Order*, however, the Commission acknowledged that the non-nationwide carriers faced legitimate technology-related obstacles in meeting the original Phase II implementation deadlines.²⁶ There remains the possibility that, in certain instances, vendors may again be unable to accommodate carriers’ deployment deadlines. The Commission’s ongoing obligation to monitor and adjust its regulatory approach requires that the Commission accordingly reconsider its enforcement posture in the *Order*.

²² *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); see *Bechtel*, 957 F.2d at 881; *P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984).

²³ See *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (citing dissenting opinion in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1200 (D.C. Cir. 1983)); *WAIT Radio*, 418 F.2d at 1158 (“provision for waiver may have a pivotal importance in sustaining the system of administration by general rule”); see also *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) (“it is well established that an agency’s authority to proceed in a complex area . . . by means of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances” citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-86 (1968)).

²⁴ See, e.g., *Report and Order*, 11 F.C.C.R. 18676, 18711 ¶ 68 (1996), *aff’d in relevant part on reconsideration*, *Memorandum Opinion and Order*, 12 F.C.C.R. 22665, 22723-24, ¶¶ 120-122 (1997); *Third Report and Order*, 14 F.C.C.R. 17388, ¶¶ 37, 45, 53 (1999); *Fourth MO&O*, 15 F.C.C.R. at 17449-17453 ¶¶ 17-30.

²⁵ *Fourth MO&O*, 15 F.C.C.R. at 17457-58 ¶ 44 (emphasis added).

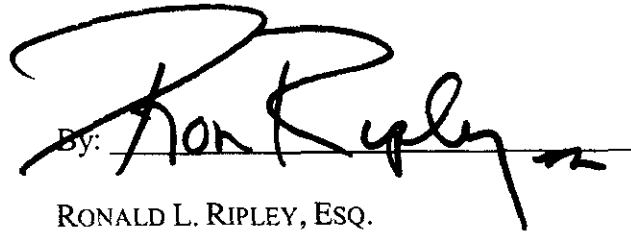
²⁶ See *supra* note 5.

CONCLUSION

For the foregoing reasons, Dobson respectfully requests reconsideration of the *Order* on the matters raised herein.

Respectfully submitted,

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Dated: August 26, 2002